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IN THE

Supreme Court of the United States

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE IN OPPOSITION

FLOYD ABRAMS
EUGENE R. SCHEIMAN
CAHILL GORDON & REINDEL
Counsel for Respondents
80 Pine Street
New York, New York 10005

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Statement of Issue Presented for Review

Did the United States Court of Appeals for the District of Columbia correctly hold that, pursuant to the long established common-law right of all citizens to inspect and copy public records, television and radio broadcasters should be permitted to copy the White House tapes played in open court and introduced in evidence in *United States* v. *Mitchell, et al.*, for the purpose of broadcasting them to the public?

Statement of the Case

The trial of former Attorney General John Mitchell, former White House aides H. R. Haldeman, John Ehrlichman and Robert Mardian and attorney Kenneth W. Parkinson commenced before Judge Sirica in the United States District Court for the District of Columbia on October 1, 1974. Central to the trial were the so-called White House tapes introduced in evidence by the prosecution. The trial lasted over 13 weeks and it is estimated that approximately 1900 members of the public attended some or all of the trial. (JA 19)* Each person attending the trial was furnished with earphones which permitted him to listen to the White House tape recordings as they were introduced in evidence and played to the jury. Transcripts of the tape recordings were published in newspapers, magazines and books. And, as petitioner's brief correctly observes, the transcripts "continue to be available at book stores around the country" (Br. p. 14).

On November 12, 1974, a group of broadcasters including National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and CBS Inc., together with the Radio Television News Directors Association, filed a petition seeking the opportunity to copy the tapes introduced in evidence so as to broadcast them to the public. (JA 5-6) On November 13, 1974, Public Broadcasting Service joined the application. (JA 13-14)

On November 19, 1975, the application of the broadcasters (which had been made before Judge Sirica) was assigned to Judge Gesell (JA 12), who directed the Clerk of the Court to prepare a statement in affidavit form detailing the mechanical procedures followed during the *Mitchell* trial in reproducing, playing to the jury and receiving in evidence the tapes and indicating any facts bearing upon the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved. All parties served with the broadcasters' application, including all the defendants, the Special Prosecutor's Office and former President Nixon, who desired to support or oppose the application were ordered to file written positions with respect thereto by November 26, 1974.

* References to "JA" are to the Joint Appendix filed with the Court of Appeals.

On November 26, 1974, the United States filed a statement concluding that the "Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted and, accordingly, does not oppose the motion." (JA 27)

The affidavit filed on November 26, 1974 by James F. Davey, Clerk of the United States District Court for the District of Columbia, confirmed that the reproducing of tapes introduced in evidence could be accomplished without either interfering with the presentation of evidence or threatening the integrity of the original court exhibits. (JA 22-23)

No opposition was filed by any of the defendants in the *Mitchell* trial with respect to the broadcasters' application.*

* Of the five defendants, only one—H. R. Haldeman—filed any document with either the district court or the Court of Appeals. That was a one-sentence statement filed by Mr. Haldeman in the Court of Appeals opposing the broadcasters' application on the ground that it could prejudice his rights, if he should be granted a new trial. Mr. Haldeman's filed document did not state when this conclusion was reached and why it was not expressed to Judge Gesell; how it was believed any prejudice would or could result; and what legal basis, if any, there was in support of his opposi-

The only opposition to the broadcasters' application was filed by former President Nixon, who contended, *inter alia,* that "broadcast of the tapes by the applicants" would "further intrude" on the need for confidentiality in presidential discussions and would violate the privacy of and embarrass individuals, including Mr. Nixon, whose voices were contained on the White House tapes. (JA 29-38)

On December 5, 1974, Judge Gesell entered an opinion and order (JA 55-62) concluding that "[t]he tape exhibits are in evidence and have therefore come into the public domain and the public should have an opportunity to hear them." (386 F.Supp. at 642) (JA 60). Judge Gesell concluded that:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. ***Ex parte Drawbaugh,*** 2 App. D.C. 404, 407 (1894). ***See also, United States*** v. ***Burka,*** 289 A.2d 376 (1972); ***Belt*** v. ***Pr. George's County Abstract Co.,*** 73 Md. 289, 20 A. 982 (1890)." (386 F.Supp. at 641) (JA 57; emphasis in original)

tion. Nor did Mr. Haldeman seek review of the decision of the Court of Appeals by this Court.

The Court of Appeals correctly held with respect to the one-sentence opposition filed with it that "[t]his pro forma statement hardly warrants careful attention." (20a, n.47) Petitioner's excerpted version of this statement (Br. p. 10) hardly does justice to the language or meaning of the Court of Appeals.

The general right of the public to have access to and copy exhibits, Judge Gesell held, was especially reenforced in this particular case by the directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457 (1970). Observing that there was "congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels", Judge Gesell concluded that "the public should have the opportunity to hear [the tapes]." (386 F.Supp. at 642) (JA 58, 60)

Judge Gesell then dealt with and rejected the arguments against broadcasting the tapes by former President Nixon. Noting that the Court had "carefully reviewed transcripts of the tapes in issue" and that it was apparent that Judge Sirica had "assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial," Judge Gesell concluded that:

> "Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words

cannot be retrieved; they are public property and his opposition is accordingly rejected." (386 F.Supp. at 642) (JA 59)

The opinion concluded with a request for suggestions from the parties by January 2, 1975 as to how the tapes should be made available to the public.

On December 27, 1974, the broadcasters and Warner Communications, Inc.* ("Warner") filed a memorandum and proposed order before Judge Gesell setting forth their detailed suggestions as to how the tapes could be reproduced and distributed to the public in a manner consistent with Judge Gesell's order of December 5, 1974. By order dated January 8, 1975, Judge Gesell declined to accept the detailed suggestions of the broadcasters and Warner with respect to the copying and distribution of the tapes. (386 F.Supp. at 643) (JA 78) Judge Gesell thereupon denied the pending applications without prejudice and referred the matter back to Judge Sirica for any further action. (386 F.Supp. at 643-44) (JA 78)

After the conclusion of the *Mitchell* trial, Judge Sirica, on March 6, 1975, held a hearing at the request of the applicants with respect to the status of the application. At the hearing, Judge Sirica requested briefing as to whether the *Mitchell* trial should be deemed over for purposes of his consideration about whether or not to permit the copying of the tapes. After submission of briefs, Judge Sirica entered an order (JA 138-43) denying immediate access to the tapes. The primary basis for the decision was Judge

* Warner filed a separate application for leave to copy the tapes on December 2, 1975. (JA 41-2) The broadcasters' appeal from Judge Sirica's ruling to the Court of Appeals was docketed as No. 75-1409; Warner's was docketed as No. 75-1410. (1a). Petitioner has chosen to reverse the order of the two cases and to treat them as one in his petition for certiorari.

Sirica's conclusion that public dissemination of the tapes might be prejudicial to the convicted defendants in the *Mitchell* case should a re-trial be ordered.

The decision of the Court of Appeals from which a writ of certiorari is now sought reversed Judge Sirica's decision—and did so on narrow and explicitly non-constitutional grounds. Holding that at common law "a right to inspect and copy public records" has long existed (8a)—a right not denied by Mr. Nixon (12a)—the Court held that the common law right extended as well to Court exhibits. Acknowledging that the right of access to judicial records was not absolute, the Court concluded that Judge Sirica had abused his discretion by permitting the "diminished interests in confidentiality" of already publicly heard tapes "to interfere with the public's right to inspect and copy the tapes." (17a)

The Court dealt first with Judge Sirica's conclusion that absent a "compelling reason" to make the tapes public he would not do so because of the possibility of interfering with the rights of the Mitchell defendants in any new trial which they might be afforded by virtue of appellate review of their convictions. Concluding that the district court had "misconceived the nature of its discretion" by placing the burden in the case on the broadcasters rather than on Mr. Nixon, the Court of Appeals held the risk of interfering with the rights of the defendants at a "hypothetical second trial" far too indefinite; insufficiently grave (in that the tapes had all been held to be admissible evidence); and all but totally unsupported by the very defendants the order was designed to protect.*

* As noted previously, only defendant Haldeman filed any opposition to the broadcasters' application and that was a pro forma opposition. (20a, n.47).

The Court of Appeals further held that Judge Gesell had not abused his discretion in determining that the tapes could be inspected and copied.* The "privacy" considerations relied upon by Mr. Nixon were rejected, as were Mr. Nixon's arguments that some kind of residual deference should be paid to presidential conversations after they had been played in open court and after their widespread publication.

The Court of Appeals further ordered that, on remand, a plan be devised which would assure prompt distribution of the tapes "on an equal basis to all persons desiring copies". On motion of Mr. Nixon, the Court of Appeals stayed its mandate pending the filing of a petition for certiorari; it did remand the record to Judge Sirica for the limited purpose of permitting the adoption of a plan of distribution of the tapes to the public.**

ARGUMENT

As is evident on examination of the decision of the Court of Appeals, it is based in its entirety on a body of law which is neither constitutional nor uniquely federal in nature.*** Instead, it is based upon the long-established "common law right to inspect public records" and to copy those records. (9a) As such, it is precisely the type de-

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* The Court decided the issue despite the failure of Mr. Nixon to file a cross-appeal. (21a, n.52).

** On January 11, 1977, the broadcasters and Warner submitted a plan to Judge Sirica pursuant to which the National Archives and Recording Service (the "National Archives") would produce and distribute the tapes to the public. The National Archives had previously agreed to accept the responsibilities involved in the plan submitted.

*** As phrased by the Court: "[w]e find no need, and therefore have no occasion, to decide the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth or Fifth Amendments to the Constitution." (11a)

cision that the Court has long since concluded should not ordinarily be reviewed. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285 (1935).

Not only is the decision one relating to the common law; it is also one arising out of a singularly unique fact situation, one unlikely to recur in the history of the republic. The right to reproduce copies of court exhibits is one which, as the Court of Appeals observed, is "a precious common law right, one that predates the Constitution itself." (15a). But the objections cited by petitioner to permitting the reproduction of *these* court exhibits not only appear never to have been made before, but seem surely unlikely to be made again. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962) *reh. denied,* 371 U.S. 854 (1962); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Nor do the three "propositions" proferred by petitioner as arising out of the decision of the Court of Appeals set forth any basis for review by this Court. The suggestion that the Court's decision violates either the letter or spirit of this Court's ruling in *United States* v. *Nixon,* 418 U.S. 683 (1974) was responded to by the Court of Appeals itself in its conclusion that:

> "In *United States* v. *Nixon,* 418 U.S. 683 (1974), The Supreme Court spoke of the 'high degree of deference' owed to Presidential conversations. The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to provide 'protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.' Thus the Court stated,
>
> > "'[T]he District Court has a very heavy responsibility to see to it that Presidential conversations,

which are either not relevant or not admissible, are accorded that high degree of respect. . . .'

"And again:

"'[T]he District Judge will at all times accord to Presidential records that high decree [sic] of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material.* . . .'

"By definition, however, the tapes played at trial are no longer confidential. Thus appellee is left to argue that somehow it would be 'unseemly' to allow tapes of White House conversations to be marketed and publicly distributed. But this is essentially a question of taste, and provides a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recording of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed. In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights." (24a-25a)

Apart from what we believe to be the evident correctness of the Court of Appeals in this regard, its decision makes clear that as to this issue it was simply holding that Judge

Gesell had not "abused his discretion" in ruling that the tapes could be generally heard. The affirmance by a Court of Appeals of such an exercise of discretion by a district judge is hardly the type case this Court has indicated should fill its already filled docket. *Moor* v. *Texas & N.O.R.R. Co.*, 297 U.S. 101, 105 (1936).

The second issue petitioner argues is raised by the decision of the Court of Appeals relates to its ruling that court exhibits are generally available for copying, except where "justice so requires". (15a) But this proposition, as the Court of Appeals demonstrated, had long since been established with respect to all public records, including exhibits held in court. The parade of horrors suggested by petition to the Court of Appeals was answered by it with deserved terseness:

"Appellee does point to examples of exhibits, such as pornographic movies and tapes of wire-tapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a power to deny public access in special cases, they do not justify a total ban on inspection." (13a-14a)•

Nor does the single case relied upon by petitioner to support a contrary result aid its position.••

• Of course, insofar as a film is statutorily protected under the copyright laws (17 U.S.C. §§ 1 *et seq.* (1970) *as amended*), no member of the public may copy the material even if it is permitted either to be shown in open court or to be excerpted in the transcripts or opinions arising out of a judicial proceeding. *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1271 (S.D.N.Y. 1970). *See also Douglas International Corp.* v. *Baker*, 335 F.Supp. 282, 285 (S.D.N.Y. 1971).

•• The case is *United States* v. *Monjar*, 154 F.2d 954 (3d Cir. 1946) (Bf. p. 16) and petitioner's reliance on it is totally misplaced. The overriding concern of the court in *Monjar* related to

Finally, the suggestion is utterly unpersuasive that the Court should review the holding of the Court of Appeals that the common law right to inspect and copy court exhibits may be overcome by the alleged "risk of causing possible prejudice" at a hypothesized second trial of a convicted felon. The Court's conclusions that the possibility of a new trial is too indefinite a basis to permit such a result,* that the material in this case all consisted of admitted evidence, and that the celebrated and well-counseled defendants had not made such arguments on their own behalf are persuasive and, we submit, controlling.

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questions of comity between the federal and state court systems. More specifically, the Court of Appeals held in *Monjar* that a Pennsylvania district attorney who was seeking various "books, documents and other exhibits" (154 F.2d at 955) obtained by subpoena *duces tecum* and introduced in evidence by the United States in a related federal trial held in the District Court of Delaware should be permitted to do so by proceeding in the state courts under the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." (154 F.2d at 958-59). "Otherwise," the Court reasoned, "the delicate balance which comity has asserted hitherto in the courts of our dual system might be disturbed." (*Id.* at 959). Furthermore, the *Monjar* Court's assertion (made in the context of its discussion of comity) that the Clerk is a "mere custodian" of the exhibits at issue in *Monjar* in no way alters or compromises the well established common-law that "judicial records, of which, by statute and unvarying usage, *the custodian*, upon payment of the fee allowed by law, is bound to furnish copies." *Brewer* v. *Watson*, 71 Ala. 299 (1882), cited in *In re Mosher*, 248 F.2d 956, (C.C.P.A. 1957) (emphasis added).

* As noted by the Court of Appeals in its opinion, the convictions of Messrs. Mitchell, Haldeman and Ehrlichman have been affirmed by it and Mr. Mardian's conviction reversed. (17a, n.41). Mr. Parkinson was acquitted. On January 17, 1977, the Special Prosecutor announced his decision not to retry Mr. Mardian. (*New York Times*, Jan. 18, 1977, p. 12, col. 6). Thus, the only defendant for whom a new trial has been ordered will not, in fact, need to stand trial at all. It is difficult to envisage a better illustration supporting the conclusion of the Court of Appeals that he claims asserted against the rights of the broadcasters and the public were far too speculative to withstand scrutiny.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
EUGENE R. SCHEIMAN
CAHILL GORDON & REINDEL
Counsel for Respondents
80 Pine Street
New York, New York 10005

February 5, 1977